SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 462

POWERS HIGGINBOTHAM,

Appellant,

vs.

CITY OF BATON ROUGE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

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Motion to Dismiss Appeal.

Where the jurisdictional fact is the alleged divestature of a contract right this Court has the right to independently determine if such vested contract right came into existence, and where the alleged right is based upon a State statute and the decision of the Supreme Court of the State interpreting that statute is against the existence of any such right this Court will not interfere and reverse the conclusion of the State court unless the State court's conclusion is palpably erroneous. In *Dodge* v. *Board of Education*, 58 S. Ct. 98, his Honor, Associate Justice Roberts, in discussing this point said:

> "In determining whether a law tenders a contract to a citizen it is of first importance to examine the lan-

guage of the statute. If it provides for the execution of a written contract on behalf of the State the case for an obligation binding upon the State is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand an act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or terms of a public officer *or employees of a state agency.* (Italics ours.)

"The Supreme Court of Illinois concluded that neither the language of the Miller law nor the circumstances of its adoption evinced an intent on the part of the legislature to write a binding contract. While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the state touching these matters."

And in the case of *Phelphs* v. *Board of Education*, 81 L. Ed. 674, 57 S. Ct. 483, his Honor Justice Roberts made this relevant observation:

This Court is not bound by the decision of the State Court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the Courts of the State.

Here those Courts have concurred in holding that the Act of 1909 did not amount to a legislative contract with the teachers of the State and did not become a term of the contracts entered into with employees by boards of education. *Unless these views are palpably erroneous we should accept them.* (Italics ours.)

We have already shown in the original brief that the conclusion of the State Supreme Court of Louisiana in holding that no vested contract right was created here is sound, and

that by no stretch of the imagination can the conclusion of the court be regarded as manifestly in error.

Argument on the Merits.

Hall v. *Wisconsin*, 26 L. Ed. 302, emphasized by appellant, when properly interpreted is against his contention. *There the State laid aside its sovereignty and entered into a written contract with a private individual in reference to a survey of a scientific nature that was wholly apart from true governmental function.* The court in that case said the surveyor so employed was not an officer whose work under the contract could be abrogated prior to the term contracted, but the true and correct distinction upon which the conclusion of the court was based is the one fact that there the services contracted for were private in nature, and not public or governmental. The very definition of a public officer given in that case makes appellant a public officer here. As to this the court said:

> In *U. S.* v. *Hatch*, 1 Pin. (Wis.), 182, the Supreme Court of the State decided that "the term *civil officers* as used in the organic law, Act of Congress of April 20, 1936, 5 Stat. at L., 10, embraces only those officers in whom a portion of the sovereignty is vested, *or to whom the enforcement of municipal regulations or the control of the general interests of society is confided, and does not include such officers as canal commissioners.*" Syllabus 3. (Italics ours.)

The true import of the decision in restricting the principle recognized is further shown by the fact that the court there treated the legal position of the plaintiff in error as in no sense materially different "from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration or repair of public buildings, or to supply the officers or employees who

occupy them with fuel, light, stationery and other things necessary for the public service."

Of course, in all such affairs the State or agencies of the State, like municipalities, have the right to consummate binding legal contracts the same as private individuals.

But here, as has been so often repeated in the original brief, appellant, after the abolition of his office as Commissioner of Parks and Streets, was simply retained in the public service to perform the same duties as Superintendent of Parks and Streets.

In *Newton* v. *Mahoning County*, 25 L. Ed. 710, the court was not dealing with any alleged distinction between an officer and an employee but was simply enunciating a principle, the inevitable philosophy of which makes the doctrine so enunciated applicable here. There citizens of a county were seeking to prevent the removal of a county court house where the earlier State law had permanently fixed it in said county. Treating with the subject this Court said:

> Undoubtedly, there are cases in which a State may, as it were, lay aside its sovereignty and contract like an individual bound accordingly. Curran *v.* Arkansas, 15, How. 304; Davis *v.* Gray, 16 Wall. 203, 21 L. Ed. 447.
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> The cases in which such contracts have been sustained and enforced are very numerous. Many of them are cases in which the question was presented whether a private Act of incorporation, or one or more of its clauses, is a contract within the meaning of the National Constitution. There is no such restraint upon the British Parliament. Hence the adjudication of that country throw but little light upon the subject.
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> The Dartmouth Coll. Case (4 Wheat.) 518), was the pioneer in this field of our jurisprudence.
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> The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a public law relating to a public subject within the do-

main of the general legislative power of the State, and involving the public rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the arguments in the Dart. Coll. Case. Mr. Chief Justice Marshall said:

"That, anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the State Legislatures were forbidden 'to pass any law impairing the obligation of contracts'; that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must, in construction, receive some limitation, it may be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. * * * If the Act of incorporation be a grant of political power; if it create a civil institution to be employed in the administration of the government; or if the funds of the college be public property; or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States."

The judgment of the court in that case proceeded upon the ground that the college was "A private eleemosynary institution, endowed with a capacity to take property for purposes unconnected with the government, whose funds are bestowed by individuals on the faith of the charter."

In the later case of E. Hartford v. Br. Co., (10 How. 511), this court further said: "But it is not found necessary for us to decide finally on this first and most doubtful question, as our opinion is clearly in favor of the defendant in error on the other question, namely; that the parties to this grant did not, by their charter, stand in the attitude toward each other of making a contract by it, such as is contemplated in the Constitution, and so could not be modified by subsequent legislation. The Legislature was acting here on the one part, and public municipal corporation on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the Legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the Legislature. * * *

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies."

The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary

or change the mode of compensation. Butler *v.* Pennsylvania, 10 How. 402.

The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character. Cooley, Const. Lim., pp. 232, 342; The Regents *v.* Williams, 9 Gill & J. 365.

In all these cases, there can be no contract and no irrepealable law, because they are "governmental subjects," and hence within the category before stated.

They involve public interests, and legislative Acts concerning them are, necessarily, public laws. Every succeeding Legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

In the case of *Crenshaw* v. *United States* 33 L. Ed. 825, the court was concerned with whether the appointment of a cadet at the National Military Academy for a fixed period of time during good behavior created a vested contract right. The court dealt with the situation as if this cadet were to be regarded as a public officer, a somewhat far-fetched basis for its discussion and one that could have been avoided by simple adherence to the sound principle the court there recognized and applied, namely, that this was, strictly speaking, a matter addressing itself to permanent government agencies, permanent government policies, and was thus one that could not be fettered or impaired by any alleged coming into existence of vested contract rights. In regard thereto Justice Lamar in that case said:

The primary question in this case, one which underlies the first, second and third of appellant's propo-

sitions stated above, is whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him? The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right. The question was before this court in Butler *v.* Pennsylvania, 51 U. S. 10 How. 402 (13-472). In that case, Butler and others, by virtue of a statute of the State of Pennsylvania, had been appointed canal commissioners for a term of one year, with compensation at four dollars per diem; but during their incumbency another statute was passed, whereby the compensation was reduced to three dollars; and it was claimed their contract rights were thereby infringed. The court drew a distinction between such a situation and that of a contract, by which "perfect rights, certain, definite, fixed private rights of property, are vested." It said: "These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents; or to reappoint them, after the measure which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice

nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. * * * It follows, then, upon principle; that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher Organic Law or Constitution of the State, as is the case in some instances in the State Constitutions, and as is exemplified in the provision of the Federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. * * * We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term 'contracts,' or, in other words, the vested, private, personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enable, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them."

* * * * * * *

In Stone *v.* Mississippi, 101 U. S. 814, 820 (25: 1079, 1080), considering the power of a Legislature to grant an irrepealable charter, for a consideration, to a lottery company, the court said: "The power of govern-

ing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign, capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things must 'vary with varying circumstances'. See also Hall *v.* Wisconsin, 103 U. S. 5. (26:302); United States *v.* Fisher, 109 U. S. 143 (27:885). Nor is the holding of this court singular. Numerous decisions to the same effect a to be found in the state courts. People *v.* Morris, 13 Wend. 325; Com. *v.* Bacon, 6 Serg. & R. 322; Com. *v.* Mann, 5 Watts & S. 418; Hyde *v.* State, 52 Miss. 665; State *v.* Smedes, 26 Miss. 47; Turpen *v.* Tipton County, 7 Ind. 172; Haynes *v.* State, 3 Humph. 480; Benford *v.* Gibson, 15 Ala. 521.

As is mentioned in the foregoing excerpt, in *Butler* v. *Pennsylvania*, 13 L. Ed. 472, the court held that a canal commissioner employed under a statute for a fixed period of time at a fixed salary of $4.00 per day did not enjoy such fixed contract right as entitled him to enjoin or prevent the law making body from reducing his pay to $3.00 per day prior to the expiration of the period of his employment.

In *Field* v. *Gregenpack*, 73 F. (2d) 945, a Federal court below reached the conclusion that a proof-reader in the office of the Public Printer is to be classified as a public officer in the sense that his employment as such did not survive on the basis of any alleged vested contract right or privilege. In another case of a lower court the exact citation of which is not at hand, the court reached the same conclusion as to a letter carrier.

In *Blake* v. *U. S.*, 26 L. Ed. 462, this Court reached the same conclusion as to an army officer.

There is no doubt but that the courts have strained the point to classify individuals regularly employed in permanent government purposes as officers, in order to avoid the consequence of vested contract rights in reference to such employments. As noted above, the correct distinction and the one that can be easily applied to individual cases is the difference between a contract for a private purpose as, for example the kind of contract involved in *Hall* v. *Wisconsin, supra*, or any other contract where the State puts aside its sovereignty and makes an agreement with a private individual for a private purpose, and a contract which has to do with a public purpose or which appertains to permanent governmental uses and functions.

His Honor Justice Roberts makes the relevant observation in *Dodge* v. *Board of Education, supra*, "on the other hand an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the time or tenure of a public officer *or employee of a State agency.*" (Italics ours.) In the present case Mr. Higginbotham was undoubtedly a public officer in the sense in which that term has been defined in the foregoing cases, but pretermitting the point, any alleged contract derived out of the Act of 1934 upon which he relies is essentially a relationship to a public concern having to do with the superintendence of public parks and streets, and with matters of public health, and public sanitation and, therefore, whether as an officer or employee, no vested contract right in regard thereto could come into legal existence.

Respectfully submitted,

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